CHAPTER 12

WILLS AND PROBATE

A. WILL DEFINITION

A will is a written document that legally controls how a person's property is to be distributed after death. The person who has died is known as a "decedent." Idaho law does permit holographic wills. A holographic will is a handwritten will. The law requires that the "material provisions" of the will be in the person's handwriting. In order to be certain that every part of this will is enforced, it is suggested that the entire will be completely in the handwriting of the person creating the will and that no portion of the will be typed or in the handwriting of another person. The will must be signed and dated to be valid, but it does not have to be notarized or witnessed.

However, the most common will used in Idaho is a more formal will. A will, other than a holographic will, must meet certain standards according to Idaho statutes and is usually prepared by a lawyer. For example, the will must be signed and dated and must be witnessed by at least two persons.

B. IF THERE IS NO WILL

When a person dies with no will (or dies "intestate" as the law calls it), the real and personal property of the deceased person is distributed according to a formula fixed by Idaho law. Without directions in a will, a judge appoints a personal representative and a guardian for minor children based upon priorities established by law. Unless the child is incompetent, any share of assets to be received by a child must be paid out to the child upon reaching age 18, regardless of the child's ability to handle the money.

In a will, it is possible to name a guardian for children who are under the age of 18, select a personal representative and create a trust extending beyond 18. Apersonal representative has the responsibility of collecting a person's assets, paying all debts and then distributing the property of the decedent to the persons entitled to receive it.

C. WHAT PROPERTY IS TRANSFERRED UPON DEATH

In a will, a person may dispose of all his or her separate property and, if married, his or her share of community property. "Separate property" is property acquired before a marriage or received by a married person as a gift or inheritance. "Community property" is all property accumulated during a marriage, except separate property. Income from separate property is also community property, unless the couple has entered into a written agreement that provides to the contrary. How the title to an asset is held does not determine whether an asset is a community asset or a separate property asset. For instance, a car that is purchased with community funds but titled in just the wife's name continues to be a community property asset.

Under Idaho law, a decedent's surviving spouse and minor children are entitled to inherit certain amounts before the claims of unsecured creditors must be paid. These include an exempt property allowance of up to $10,000, a homestead allowance of up to $50,000, and a family support allowance of up to $18,000.

D. CHANGING A WILL

There are methods for changing a written will. One method is to use a codicil, which is a formal, written amendment to a will. Another method is to write a new will which should expressly revoke the earlier will.

E. ESTATE TAXES

An estate tax is a transfer tax on the value of assets owned by a person at the time of death after debts and death expenses are paid. For estate tax purposes, the full face value of life insurance owned by the decedent is included in the calculation, even though another person is named as beneficiary of the life insurance policy. Assuming a person has not made gifts during his or her lifetime which used up a part of the lifetime gift tax/inheritance tax credit, an estate will avoid federal estate taxes as long as the estate is worth less than $2,000,000 in 2006, 2007, and 2008, and $3,500,000 in 2009. With proper tax planning a married couple can double the amount that can be passed free of federal estate tax. No estate taxes are imposed with respect to a decedent dying in 2010. For 2011 and later years, the tax-exempt amount is reduced to $1,000,000.

F. PROBATE PROCEDURES IN IDAHO

When a person dies, a probate is usually necessary to transfer ownership of assets from that person's estate to his or her beneficiaries. The probate process may involve obtaining a court order determining who is entitled to receive assets from the decedent's estate. A probate estate consists of the assets owned by a person at the time of his or her death. Assets such as life insurance proceeds and individual retirement accounts are not included in a probate unless the policy named the person's estate as the beneficiary or unless the beneficiary named in the policy is not living.

G. COST OF PROBATE

It is generally necessary to hire a lawyer to probate an estate. The fee charged by an Idaho attorney is based upon the time and difficulty of the matter handled and is calculated on the basis of the time required by the attorney to do the work required. As in any other business situation, it is important to discuss the fee arrangement before the work is actually started.

H. PROBATE AVOIDANCE

For a married couple in Idaho, probate can be avoided at the time of the first spouse's death if all the property owned by both spouses is community property (not separate property) and the married couple has signed a community property agreement specifying that everything is to go to the surviving spouse. This agreement must contain the legal description of all real estate and must be recorded prior to the first spouse's death in each county where real property is owned, as well as the county where the parties reside. The signatures of the parties must be acknowledged (similar to a deed). Please note, however, that this action may result in higher estate taxes due upon the death of the surviving spouse. It is therefore suggested that you consult with an attorney first.

Probate may also be avoided when the person who dies owns no real estate and no titled property (such as cars or savings accounts) and there are no debts or disputes over who is entitled to receive the assets. If a person's estate is worth less than $101,000 and does not include any real estate, an affidavit procedure may be available without the necessity of a probate. In addition, there are summary procedures available if the surviving spouse is the sole heir or if the value of the estate does not exceed available allowances and authorized expenses or debts.

I. LIVING (REVOCABLE) TRUSTS

A Living Trust, also known as a Grantor Trust or Revocable Trust, can be used by married persons or unmarried persons to avoid probate and to provide for asset management. In order to avoid probate, the trust must be properly drafted and must have all assets either transferred to the trust or payable on death to the trust. While such trusts are a legitimate estate planning tool in the hands of a competent attorney, because of their complexity and the need for transferring assets to the trust, they are generally more expensive than a will. When Living Trusts are marketed by telephone or door-to-door salespeople, they are frequently overpriced, poorly drafted and do nothing to complete the essential process of transferring assets to the trust.